

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL MORENO,)	
)	No. CV-09-3072-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on June 11, 2010 (Ct. Rec. 13,16). Attorney D. James Tree represents plaintiff; Special Assistant United States Attorney David R. Johnson represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 8). On April 12, 2010, plaintiff filed a reply (Ct. Rec. 18). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment (Ct. Rec. 16) and **DENIES** plaintiff's motion for summary judgment (Ct. Rec. 13).

JURISDICTION

Plaintiff protectively applied for supplemental security income (SSI) benefits on February 13, 2007, alleging onset beginning February 1, 2006 (Tr. 57). The application was denied

1 initially and on reconsideration (Tr. 30-33, 35-36).
2 Administrative Law Judge (ALJ) Gene Duncan held a hearing on
3 January 21, 2009 (Tr. 188-221). Plaintiff, represented by counsel,
4 psychologist Ronald Klein, Ph.D., and vocational expert Daniel
5 McKinney testified. On March 9, 2009, the ALJ issued a decision
6 finding plaintiff not disabled (Tr. 15-25). The Appeals Council
7 denied a request for review on June 13, 2009 (Tr. 5-7). Therefore,
8 the ALJ's decision became the final decision of the Commissioner,
9 which is appealable to the district court pursuant to 42 U.S.C. §
10 405(g). Plaintiff filed this action for judicial review pursuant
11 to 42 U.S.C. § 405(g) on August 6, 2009 (Ct. Rec. 1,4).

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing
14 transcript, the ALJ's decision, the briefs of the parties, and
15 summarized here where relevant.

16 Plaintiff was 33 years old when he applied for benefits and
17 35 on the date of the ALJ's decision (Tr. 24). He has an eleventh
18 grade education and has worked in landscaping as a lawn service
19 worker, in construction, and as a house painter (Tr. 62-63, 65,
20 193-195,215). He alleges disability as of February 1, 2006, due to
21 knee injuries, obesity, and depression (Tr. 61-62). Plaintiff
22 testified he "can't stand up too long"; his left leg snaps a lot;
23 he cannot twist it, and the pain interferes with sleep (Tr. 195-
24 196). Mr. Moreno's leg pain extends up to his back and hurts
25 constantly but worse in cold weather; at times his left knee
26 swells; "it locks a lot" and feels like it "wants to go out" (Tr.
27 195-198, 201). Plaintiff takes no medication because he dislikes
28

1 pills (Tr. 197). He is beginning to have pain in the right knee
2 but has not sought treatment (Tr. 199, 209). Plaintiff has no
3 insurance and has had no treatment for over a year (Tr. 204, 209,
4 213). He can stand and sit 45 to 60 minutes, walk one and a half
5 to two blocks, and lift 35-40 pounds (Tr. 200). Walking on uneven
6 surfaces causes his leg to "hurt a lot" (Tr. 202). He walks more
7 slowly than other people and tires quickly. Plaintiff acknowledges
8 he is obese and deconditioned (Tr. 199, 202, 207-209). He does not
9 use a cane (Tr. 211).

10 Activities include reading (Tr. 204); reclining in a chair
11 with both legs elevated for 4-5 hours a day (Tr. 197, 208, 218-
12 219); sitting down a lot (Tr. 199); taking out trash and mowing
13 the lawn with a riding mower (Tr. 210), shooting guns (Tr. 204),
14 seeing his three children (Tr. 212), and visiting with friends
15 (Tr. 202). When asked if he could perform essentially sedentary
16 work, plaintiff answered, "I'm sure I could" (Tr. 203). He is
17 mildly depressed (Tr. 203-204).

18 SEQUENTIAL EVALUATION PROCESS

19 The Social Security Act (the Act) defines "disability"
20 as the "inability to engage in any substantial gainful activity by
21 reason of any medically determinable physical or mental impairment
22 which can be expected to result in death or which has lasted or
23 can be expected to last for a continuous period of not less than
24 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
25 also provides that a Plaintiff shall be determined to be under a
26 disability only if any impairments are of such severity that a
27 plaintiff is not only unable to do previous work but cannot,
28

1 considering plaintiff's age, education and work experiences,
2 engage in any other substantial gainful work which exists in the
3 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
4 Thus, the definition of disability consists of both medical and
5 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
6 (9th Cir. 2001).

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled.
9 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
10 is engaged in substantial gainful activities. If so, benefits are
11 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
12 the decision maker proceeds to step two, which determines whether
13 plaintiff has a medically severe impairment or combination of
14 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

15 If plaintiff does not have a severe impairment or combination
16 of impairments, the disability claim is denied. If the impairment
17 is severe, the evaluation proceeds to the third step, which
18 compares plaintiff's impairment with a number of listed
19 impairments acknowledged by the Commissioner to be so severe as to
20 preclude substantial gainful activity. 20 C.F.R. §§
21 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
22 App. 1. If the impairment meets or equals one of the listed
23 impairments, plaintiff is conclusively presumed to be disabled.
24 If the impairment is not one conclusively presumed to be
25 disabling, the evaluation proceeds to the fourth step, which
26 determines whether the impairment prevents plaintiff from
27 performing work which was performed in the past. If a plaintiff is
28

1 able to perform previous work, that Plaintiff is deemed not
2 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
3 this step, plaintiff's residual functional capacity ("RFC")
4 assessment is considered. If plaintiff cannot perform this work,
5 the fifth and final step in the process determines whether
6 plaintiff is able to perform other work in the national economy in
7 view of plaintiff's residual functional capacity, age, education
8 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon plaintiff to establish
11 a *prima facie* case of entitlement to disability benefits.
12 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
13 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
14 met once plaintiff establishes that a physical or mental
15 impairment prevents the performance of previous work. The burden
16 then shifts, at step five, to the Commissioner to show that (1)
17 plaintiff can perform other substantial gainful activity and (2) a
18 "significant number of jobs exist in the national economy" which
19 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
20 Cir. 1984).

21 STANDARD OF REVIEW

22 Congress has provided a limited scope of judicial review of a
23 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
24 the Commissioner's decision, made through an ALJ, when the
25 determination is not based on legal error and is supported by
26 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
27 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

1 "The [Commissioner's] determination that a plaintiff is not
2 disabled will be upheld if the findings of fact are supported by
3 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
4 Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is
5 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
6 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
7 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
8 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
9 573, 576 (9th Cir. 1988). Substantial evidence "means such
10 evidence as a reasonable mind might accept as adequate to support
11 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
12 (citations omitted). "[S]uch inferences and conclusions as the
13 [Commissioner] may reasonably draw from the evidence" will also be
14 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
15 review, the Court considers the record as a whole, not just the
16 evidence supporting the decision of the Commissioner. *Weetman v.*
17 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(*quoting* *Kornock v.*
18 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

19 It is the role of the trier of fact, not this Court, to
20 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
21 evidence supports more than one rational interpretation, the Court
22 may not substitute its judgment for that of the Commissioner.
23 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
24 (9th Cir. 1984). Nevertheless, a decision supported by substantial
25 evidence will still be set aside if the proper legal standards
26 were not applied in weighing the evidence and making the decision.
27 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
28

433 (9th Cir. 1987). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ALJ'S FINDINGS

At step one the ALJ found plaintiff has not engaged in substantial gainful activity since onset (Tr. 17). At steps two and three, he found plaintiff suffers from knee injuries¹ and obesity, impairments that are severe but do not meet or medically equal the requirements of the Listings² (Tr. 17, 19). After finding plaintiff not fully credible, the ALJ assessed Mr. Moreno's RFC (Tr. 21). At step four, relying on the VE, he found a person with plaintiff's limitations and background could not perform his past relevant work (Tr. 24; 216). At step five, again relying on the VE, the ALJ found plaintiff is able to perform other work such as assembling small parts and electronics (Tr. 24-25; 216-217). The ALJ found plaintiff not disabled (Tr. 25).

ISSUES

Plaintiff contends that the Commissioner erred when he assessed plaintiff's credibility and weighed the medical evidence. Specifically, Mr. Moreno alleges (1) at step 3, the ALJ should

¹Specifically, degenerative joint disease (DJD), left knee, post medial meniscectomy, second meniscectomy left knee, and arthritis left knee (Tr. 17).

²

According to Mr. Moreno, he meets the criteria of Listing 1.02A because he has demonstrated an inability to ambulate effectively (Ct. Rec. 14 at 12-16).

1 have found his impairments met or equaled Listing 1.02A; and (2)
2 at step 5, the assessed RFC should have included an option to
3 recline and elevate his leg/foot (Ct. Rec. 14 at 12-16). The
4 Commissioner answers that one, the ALJ's step three analysis is
5 supported both by the medical evidence and plaintiff's
6 credibility, and two, the RFC assessment is free of legal error
7 and includes all limitations supported by substantial evidence.
8 Accordingly, the Commissioner asks the court to affirm (Ct. Rec.
9 17 at 7-14; reclining option, at 14-16).

10 DISCUSSION

11 A. Weighing medical opinion evidence

12 In Social Security proceedings, the claimant must prove the
13 existence of a physical or mental impairment by providing medical
14 evidence consisting of signs, symptoms, and laboratory findings;
15 the claimant's own statement of symptoms alone will not suffice.
16 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
17 on the basis of a medically determinable impairment which can be
18 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
19 medical evidence of an underlying impairment has been shown,
20 medical findings are not required to support the alleged severity
21 of symptoms. *Bunnell v. Sullivan*, 947, F.2d 341, 345 (9th Cr.
22 1991).

23 A treating physician's opinion is given special weight
24 because of familiarity with the claimant and the claimant's
25 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9th Cir.
26 1989). However. The treating physician's opinion is not
27 "necessarily conclusive as to either a physical condition or the
28 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,

1 751 (9th Cir. 1989)(citations omitted). More weight is given to a
2 treating to a treating physician than an examining physician.
3 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).
4 Correspondingly, more weight is given to the opinions of treating
5 and examining physician's opinions that to nonexamining
6 physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir.
7 2004). If the treating or examining physician's opinions are not
8 contradicted, they can be rejected only with clear and convincing
9 reasons. *Lester*, 81 F.3d at 830. If contradicted, the ALJ may
10 reject an opinion if he states specific, legitimate reasons that
11 are supported by substantial evidence. See *Flaten v. Secretary of*
12 *Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir. 1995).

13 In addition to the testimony of a nonexamining medical
14 advisor, the ALJ must have other evidence to support a decision to
15 reject the opinion of a treating physician, such as laboratory
16 test results, contrary reports from examining physicians, and
17 testimony from the claimant that was inconsistent with the
18 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
19 751-752 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d at 1042-1043
20 (9th Cir. 1995).

21 *Physical impairments*

22 After Mr. Moreno's first knee surgery in 1995 or 1996,
23 treating surgeon Brent Bingham, D.O., in December of 2003 notes
24 plaintiff's knee was fine afterward and he was able to work until
25 he twisted his leg while working in lawn maintenance in 2003 (Tr.
26 22; Ex. 2F/7; Tr. 104, 148). The ALJ notes there is no medical
27 evidence of knee complaints until 2007, despite plaintiff's
28 alleged onset date of February 1, 2006 (Tr. 15, 22, Ex. 7F/1, Tr.

1 108).

2 More than two years before onset, in November of 2003, MRI
3 results showed mild to moderate degenerative changes and meniscus
4 tearing (Tr. 106). On December 3, 2003, Dr. Bingham performed a
5 partial lateral meniscectomy and synovectomy and shaved the
6 intercondylar notch (Tr. 107). Post operatively he diagnosed an
7 additional tear to the lateral meniscus, erosion of the lateral
8 femoral compartment, partial disruption of the ACL and reactive
9 synovitis (Id). By January 12, 2004, Dr. Bingham notes good ROM;
10 plaintiff says knee is better but still bothers him; wants to play
11 basketball, which Dr. Bingham recommends against. Dr. Bingham told
12 Mr. Moreno to get off of his crutches, continue exercises, and
13 limit exercise to low-impact (Tr. 110).

14 On March 20, 2007, plaintiff reports daily activities include
15 walking his children to and from school and taking the bus to
16 college. When home he sits a lot and tries to go for long walks
17 but his leg "hurts a lot and gets swollen" (Tr. 68). He cares for
18 the children without help, cooks, does laundry, shops weekly and
19 goes "for rides" regularly (Tr. 69-72; 113). He can walk half a
20 mile. He describes no sitting limitations and uses no assistive
21 devices (Tr. 73-74).

22 Test results on March 24, 2007, show "early changes of
23 degenerative arthritis" in the right knee. The left knee shows
24 changes of degenerative arthritis (Tr. 136).

25 On April 28, 2007, examining physician Marie Ho, M.D.,
26 observes plaintiff takes no pain medication for his knee pain (Tr.
27 130). If he sits too long, his legs go numb. Plaintiff weighs 340
28 pounds. Obesity exacerbates his knee pain (Tr. 131). He has never

1 been diagnosed with or treated for depression, but reports
2 becoming depressed after the second knee surgery because he was
3 accustomed to being active and now lacks the ability. On an
4 average day he attends college. Plaintiff lives with his
5 girlfriend and does not use recreational drugs or drink alcohol
6 (Tr. 131).

7 Dr. Ho found strength was 5/5 in all extremities. She
8 diagnosed chronic left knee pain with limited ROM, status post two
9 arthroscopic surgeries, morbid obesity, and depression by history,
10 with no evaluation or treatment (Tr. 134). Dr. Ho opined plaintiff
11 can stand and walk cumulatively six of eight hours a day. If
12 needed, he may sit cumulatively six hours in a day. Lifting and
13 carrying are limited to 20 pounds occasionally and 10 frequently.
14 He should kneel and crouch only occasionally (Tr. 134).

15 In June of 2007 (Tr. 148), plaintiff told treating physician
16 Paul Degenfelder, M.D., he had no "significant conservative
17 treatment in the last three years." His lifestyle is sedentary. He
18 does not use alcohol. Mr. Moreno is "trying to go back to school
19 to train in something that provides him with a desk job" (Tr.
20 148). Plaintiff is able to ambulate without assistive devices and
21 has no appreciable limp (Tr. 149). Review of x-rays taken the same
22 day show some mild DJD in both knees, left greater than right (Tr.
23 150). Dr. Degenfelder prescribed physical therapy and home
24 exercise and directed plaintiff to return in 6 weeks (Tr. 150).

25 In September of 2007 plaintiff's physical therapist notes Mr.
26 Moreno walked a half mile daily last week, although he continues
27 to have pain in the morning and in cold weather. He partially
28 complied with performing home exercises. Plaintiff was discharged

1 September 13, 2007 (Tr. 157-158).

2 On October 4, 2007, orthopedic surgeon Gene Griffiths, M.D.,
3 observed imaging tests show significant loss of point space and
4 "osteophytosis about the lateral compartment," and diagnosed
5 significant DJD osteoarthritis of the left knee lateral
6 compartment. He prescribed nonsteroidal medication (Tr. 145, 147).

7 In December of 2007, examining practitioner Vicki Love, ARNP,
8 notes no current indication or history of substance abuse (Tr.
9 165). She opined it is reasonable to expect plaintiff's diagnosed
10 knee condition to produce reported symptoms, recommended
11 additional physical therapy, and opined Mr. Moreno can perform
12 sedentary work (Tr. 165-167).

13 Also in December of 2007, plaintiff reports he lives with
14 friends. He attends college to finish his GED and criminal justice
15 programs. He can only stand for two hours (Tr. 171).

16 On January 18, 2008, a radiologist opines plaintiff has mild
17 narrowing of joint spaces with small associated osteophytes, and
18 mild degenerative changes in both knees (Tr. 163, 169).

19 After the hearing, on February 9, 2009, Anthony Francis,
20 M.D., reviewed records. He opined plaintiff's impairments meet or
21 equal Listing 1.02A (Tr. 177-178). Dr. Francis cites several
22 records predating onset in 2006 by years: 1995; October 2003;
23 November 2003; November 20, 2003; December 3, 2003, and December
24 4, 2003 (Tr. 176-177).

25 *Psychological impairment*

26 On March 29, 2007, examining physician C. Donald Williams
27 notes most of plaintiff's work has been "under the table." His
28 work involves driving around without a license to "get parts and

1 stuff." He has been able to go from job to job but has not worked
2 in four months; he has gone to college the past six months (Tr.
3 112), reporting he "misses a lot" of school or "a day or two."
4 Sometimes his children take a taxi to school because it is hard
5 for him to walk every day. Dr. Williams diagnosed cannabis
6 dependence in sustained remission, alcohol abuse in partial
7 remission, and personality trait disturbances. He opined plaintiff
8 does not meet the diagnostic criteria for depression, an opinion
9 echoed by Dr. Klein at the hearing (Tr. 189-191). Dr. Williams
10 assessed a GAF of 70, indicating mild symptoms (Tr. 112-113; 115).
11 The ALJ found depression does not cause more than minimal
12 limitation in functioning (Tr. 18), an unchallenged finding on
13 appeal.

14 *Credibility*

15 The ALJ evaluated plaintiff's credibility and found him less
16 than fully credible (Tr. 22-23). Credibility determinations bear
17 on evaluations of medical evidence when an ALJ is presented with
18 conflicting medical opinions or inconsistency between a claimant's
19 subjective complaints and diagnosed condition. See *Webb v.*
20 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

21 It is the province of the ALJ to make credibility
22 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
23 1995). However, the ALJ's findings must be supported by specific
24 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
25 1990). Once the claimant produces medical evidence of an
26 underlying medical impairment, the ALJ may not discredit testimony
27 as to the severity of an impairment because it is unsupported by
28 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.

1 1998). Absent affirmative evidence of malingering, the ALJ's
2 reasons for rejecting the claimant's testimony must be "clear and
3 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
4 "General findings are insufficient: rather the ALJ must identify
5 what testimony not credible and what evidence undermines the
6 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
7 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

8 The ALJ relied on several factors when he assessed
9 plaintiff's credibility. Medical evidence fails to support the
10 claimed level of limitation. Mr. Moreno inexplicably failed to
11 seek treatment even when medically insured. He did not follow
12 recommended treatment by failing to take prescribed nonsteroidal
13 anti-inflammatory medication (Tr. 22).

14 The lack of medical support for claimed limitations is a
15 proper reason to doubt credibility, provided it is not the sole
16 reason. *Burch v. Barnhart*, 400 F.3d 676, 679-681 (9th Cir. 2005);
17 *Bunnell v. Sullivan* 947 F.2d 341, 345 (9th Cir. 1991). As it is
18 not the sole factor the ALJ relied on, and it is supported by the
19 record, including 2008 test results, this is a clear and
20 convincing reason.

21 The ALJ observes plaintiff fails to explain why he sought no
22 medical treatment for allegedly severe symptoms until 2007,
23 despite alleging onset as of February 1, 2006 (Tr. 15, 22, Exhibit
24 7F/1, Tr. 108). The lack of consistent treatment can cast doubt on
25 a claimant's credibility. *Burch*, 400 F.3d at 676; *Fair v. Bowen*,
26 885 F.2d 597, 603 (9th Cir. 1989).

27 Plaintiff failed to take prescribed anti-inflammatory
28 medication because he does not like pills. Noncompliance with

1 medical care or unexplained or inadequately explained reasons for
2 failing to seek medical treatment casts doubt on a claimant's
3 subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair*, 885
4 F.2d 603 (9th Cir. 1989).

5 The ALJ's reasons for finding plaintiff less than fully
6 credible are clear, convincing, and fully supported by the record.
7 *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
8 2002)(additional proper factors include inconsistencies in
9 plaintiff's statements, inconsistencies between statements and
10 conduct, and extent of daily activities).

11 The ALJ is responsible for reviewing the evidence and
12 resolving conflicts or ambiguities in testimony. *Magallanes v.*
13 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
14 trier of fact, not this court, to resolve conflicts in evidence.
15 *Richardson*, 402 U.S. at 400. The court has a limited role in
16 determining whether the ALJ's decision is supported by substantial
17 evidence and may not substitute its own judgment for that of the
18 ALJ, even if it might justifiably have reached a different result
19 upon de novo review. 42 U.S.C. § 405(g).

20 **B. Step 3 - Listing 1.02A**

21 The parties agree plaintiff must establish an inability to
22 ambulate effectively to meet or medically equal Listing 1.02A.
23 Plaintiff maintains he meets this requirement.

24 Listing 1.00B.2.b(1) provides:

25 an "inability to ambulate effectively" means "an extreme
26 limitation of the ability to walk."

27 20 C.F.R. Part 404,, Subpart P, Appendix A 1, Listing.

28 The Commissioner correctly points out the Listings generally

1 define an inability to ambulate effectively as "insufficient lower
2 extremity functioning . . . to permit independent ambulation
3 **without the use of a hand-held-assistive device that limits the**
4 **use of both upper extremities.**" (Ct. Rec. 17 at 8, citing 20
5 C.F.R. Part 404, Subpart P, App. 1, 1.00B.2.b (1))(bold added).
6 The example given is an "inability to walk a block at a reasonable
7 pace on rough or uneven surfaces[.]" (Id., at 1.00B.2.b(2)).

8 The only evidence of pace when walking on uneven surfaces is
9 plaintiff's properly discredited testimony. He testified he cannot
10 walk on uneven ground. If he does, his leg hurts a lot. He walks
11 slower than most people but takes "regular strides" (Tr. 202,
12 207).

13 The ALJ's RFC prohibited walking on uneven surfaces (Tr. 21).
14 Contrary to plaintiff's assertion, the limitation does not equate
15 to meeting the Listing's requirements.

16 The only evidence plaintiff meets or equals a listing is Dr.
17 Francis's post-hearing report. The ALJ observes:

18 Dr. Francis reviewed the medical evidence of
19 record, although it appears he did not examine
20 the claimant. Dr. Francis opined that claimant's
21 condition has met or medically equaled Listing
22 1.02A since the time of his [second] arthroscopy
23 in 2003 (Ex. 13F/4).

24 Dr. Francis focused on Dr. Griffith's [October 2007]
25 statement that the claimant would require a total
26 knee arthroplasty in the future (Ex. 13F/4). Dr.
27 Francis opined that the fact that a total knee
28 replacement was even mentioned indicates that the
claimant has significant degenerative arthritis
(Ex. 13F/4). However, as noted above, the claimant's
most recent x-rays of January 2008 reveal only mild
degenerative changes in both knees (Ex. 12F/1)
[Tr. 163, 169].

Prior to this x-ray, Dr. Griffiths reported that
the claimant's gait was reasonably normal, Dr.
Degenfelder stated that he could ambulate without

1 assistive devices, and Dr. Ho opined that he could
2 stand/walk up to six hours in an eight-hour workday.
3 Clearly the requirement for meeting 1.02A has not
been met as the claimant is able to ambulate
effectively.

4 The undersigned does not agree with Dr. Francis'
5 opinion that 'it can be inferred from [the claimant's]
6 exam that he has significant problems ambulating
effectively'(Ex. 13F/4). Four of his treating and
7 examining physicians appear to have found exactly
the opposite.

8 (Tr. 20).

9 The opinions of treating an examining physicians are entitled
10 to greater weight than nonexamining physicians. *Benecke v.*
11 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004). The ALJ's reason for
12 rejecting Dr. Francis' contradicted step 3 opinion, because it is
13 directly contradicted by treating and examining doctors, is
14 specific, legitimate and supported by substantial evidence. See
15 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463
(9th Cir. 1995).

16 The ALJ's step 3 determination is further supported by his
17 credibility assessment. The ALJ was not required to credit
18 plaintiff's discredited testimony he walks more slowly than other
19 people.

20 The ALJ's step 3 determination is free of legal error and
21 supported by substantial evidence. Plaintiff fails to meet his
22 burden of establishing his impairments, including obesity, meet or
23 medically equal a Listed impairment. See *Meanel v. Apfel*, 172 F.3d
24 1111, 1113 (9th Cir. 1999)(plaintiff has burden of proof during
25 the first 4 of the 5 step sequential evaluation).

26 C. Step 5

27 Plaintiff alleges the ALJ's RFC should have included options
28

1 to recline and elevate the leg/foot (Ct. Rec. 14 at 12-16).

2 The ALJ points out no doctor has opined plaintiff cannot work
3 because of his condition [other than Dr. Francis]. Plaintiff
4 testified that no doctor had placed him on any restrictions. Most
5 significantly, Mr. Moreno testified if offered a job where he
6 could remain seated most of the time, he could perform the work
7 (Tr. 23).

8 The ALJ's assessed RFC for sedentary work with additional
9 limitations is fully supported by the evidence. The ALJ failed to
10 include an option to recline and elevate the leg/foot in his RFC
11 because the limitation is based solely on Mr. Moreno's discredited
12 testimony.

13 The ALJ is responsible for reviewing the evidence and
14 resolving conflicts or ambiguities in testimony. *Magallanes*, 881
15 F.2d at 751 (9th Cir. 1989). The court finds the assessed RFC is
16 free of legal error and supported by substantial evidence.
17 Accordingly, the RFC and questions to the VE are sufficient. See
18 *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001).

19 The ALJ provided clear and convincing reasons for finding
20 plaintiff's allegations not fully credible. His assessment of the
21 medical and other evidence is supported by the record and free of
22 legal error.

23 CONCLUSION

24 Having reviewed the record and the ALJ's conclusions, this
25 court finds that the ALJ's decision is free of legal error and
26 supported by substantial evidence.

27 IT IS ORDERED:

28 1. Defendant's Motion for Summary Judgment (Ct. Rec. 16) is

1 **GRANTED.**

2 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is

3 **DENIED.**

4 The District Court Executive is directed to file this Order,
5 provide copies to counsel for the parties, enter judgment in favor
6 of Defendant, and **CLOSE** this file.

7 DATED this 26th day of July, 2010.

8
9 s/ James P. Hutton

10 JAMES P. HUTTON
11 UNITED STATES MAGISTRATE JUDGE
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